Burleigh

Families

Cornelius Albertson
Burley

(6)

15 Aug. 1830. Martha Marion, daughter of John Swartz & Sarah, his wife.

15 Aug. 1830. Mary Jane, daughter of John Swartz and Sarah, his wife.

15 Aug. 1830. Henry, son of John Swartz and Sahah, his wife.

19 Augt. 1830. Cornelius A. Burley, a condemned criminal - aged as he supposed about 26 or 27.*

29 Augt. 1830. George Augustine, son of Alva Elliot & Rhoda, his wife.

22 Augt. 1830. Matilda, daughter of James Goulding & Jane, his wife.

3 Octr. 1830. Sylvester, son of Joseph B. Flanagan & Flora, his wife.

3 Octr. 1830. Elmira, daughter of Henry Oneil and Mahella, his wife.

3 Octr. 1830. Eleanor, daughter of Henry Collins & Jane, his wife.

24 Octr. 1830. William Henry, son of Simon Howard & Anns, his wife.

16 Novr. 1830. Lewis Algeo, son of George Bailey and Margaret, his wife.

19 Novr. 1830. Lovina, daughter of James Parkinson & Sally, his wife.

* The first man to pay the supreme penalty of the law in London - hanged for the murder of Timothy C. Pomeroy, a constable.

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IN THIS ISSUE

THE FAMILY COMPACT AT WORK: THE SECOND HEIR AND DEVISEE COMMISSION OF UPPER CANADA, 1805-1841

by H. Pearson Gundy

Early land policy in Upper Canada, as Dr. Lillian Gates has pointed out, veered between free grants to reward Loyalists and encourage British settlement, and a revenue system of fees and sales to supplement the casual and territorial revenue.[1] Rules and regulations were often changed by proclamation, and so generally unknown or ignored that rigid enforcement became impossible. Speculation and peculation were rife in the early years; records were often faulty, surveys inadequate and sometimes inaccurate. Squatters occupied land held by absentee owners; large tracts were granted to land agents, and a checkerboard pattern of a Crown and Clergy Reserves impeded consolidated settlement. Land certificates granted to nominees of the Crown, to be exchanged for letters patent after certain settlement duties were performed, were often treated as if they were, in fact, deeds, and as such they were devised, exchanged, or sold. Thus, by the mid 1790s, property rights were in a state of such chaos and confusion that remedial action was imperative. Hence the establishment in 1797 of the first Heir and Devisee Commission of Upper Canada.[2] It acted virtually as a court of equity to review and adjudicate claims to land based on grants where no letters patent had issued to the original nominees of the Crown, their heirs, devisees or assigns. The act of Parliament setting up this Commission, amended in 1802, continued in operation until 1805. The success and shortcomings of this first attempt to disentangle property rights in Upper Canada are amply and ably dealt with by Miss Gates in her article on the original Commission in CHR (v. 38, 1957, 21-36).

Scant attention, however, has been paid to the second Heir and Devisee Commission, established by a new act of the Legislature in 1805, repeatedly renewed, with minor amendments, and not officially abolished until 1911.[3] Perhaps one reason for this neglect in recent years may be Miss Gates' contention that by 1805 "the bulk of the Commission's work" was accomplished. Afterwards, the second Commission had to deal only with the few claims that continued to "dribble in".[4] But this "dribble", so called, now occupies some fifty linear feet of shelving in the Ontario Archives, containing forty-four boxes tightly packed with a multitude of dockets representing the claims preferred before the Commission, along with Minute Books,[5] annual reports of the Commission to the Lieutenant Governor in Council,[6] and six index volumes.[7]

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1. Lillian Gates, *Land Policies of Upper Canada* (Toronto: University of Toronto Press, 1968).
2. U.C. Stat., 37 Geo III, c. 3.
3. Ont. Stat. 1 Geo. V, c. 17, s. 43.
4. Lillian Gates, "The Heir and Devisee Commission of Upper Canada," *CHR*, v. 37 (1957), p. 36.
5. PAO, RG 40. Minute Books I, Ia and II cover the period 1810 to 1841. Earlier Minutes are missing; Book II continues to 1845.
6. PAO, RG 1, Ser. A-II-5. The reports from 1805 to 1811 are on loose sheets, some in duplicate; there are three bound volumes 1812-1828 (1815 missing); 1829-1836; 1837-1840. (These are the Surveyor General's copies.)

The Commissioners for the period 1805 to 1841, with which this paper deals, were almost without exception members of the Tory governing clique.[8] Here they are in action — Rev. John Strachan, James Baby, James B. Macaulay, Thomas Ridout, D'Arcy Boulton, John Beverley Robinson, Christopher A. Hagerman, Levius P. Sherwood, Jonas Jones, and others — the "Family Compact" at work. Theirs is an impressive record, accomplished without fear or favor, with general satisfaction, and with a dedication in their capacity as Commissioners that exempted the second Heir and Devisee Commission from William Lyon Mackenzie's long list of public grievances.[9]

What, then was the nature of the second Commission, its mode of operation and its record of accomplishment?

The Act of 1805 was officially named "An Act to afford relief to those persons who may be entitled to claim lands in this Province as heirs or devisees of the nominees of the Crown in cases where no patent hath issued for such lands" (45 Geo. III, c. 2). By 1805 many of the original nominees had died or had left the country. Those who were still living in Upper Canada were enabled to apply directly to the Surveyor General for their patents, thereby confining claims before the Commission to those of heirs, devisees, or assigns.

Appointments to the Commission were made by the Lieutenant Governor from members of the Executive Council and the Court of King's Bench; the Chief Justice was an *ex officio* member. Three Commissioners, of whom one had to be a judge, formed a quorum; six constituted a full tribunal. Decision was by a majority vote of the Commissioners present. A dissenting member could enter a minority report,[10] but in point of fact this seldom happened; in almost all cases unanimity prevailed.

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7. PAO, RG 1, Ser. A-II-5 and RG 40. There are five period volumes 1840 to 1892, varying somewhat in form, all superseded by a general threefold index to dockets 1805 to 1892, by year, by surname of claimant, and by location of claim.

8. The Commissioners, 1805 to 1841, and year of appointment were: William Dummer Powell (1805), Peter Russell (1805), John McGill (1805), Thomas Scott (1805), Robert Thorpe (1806), Aeneas Shaw (1807), Alexander Wood (1808), Prideaux Selby, (1808), Thomas Ridout (1810), William Campbell (1812), Rev. John Strachan (1816), D'Arcy Boulton (1818), Levius P. Sherwood (1826), James Buchanan Macaulay (1826), Christopher A. Hagerman (1826), William Chewett (1829), John Beverley Robinson (1829), Peter Robinson (1829), George H. Markland (1830), Joseph Wells (1831), John Elmsley (1831), Samuel P. Hurd (1832), Augustus Baldwin (1836), Robert B. Sullivan (1836), William Allan (1836), John Macaulay (1837), William H. Draper (1838), Jonas Jones (1839), Archibald McLean (1839), Robert S. Jameson (1839), Richard H. Tucker (1840).

9. Mackenzie advocated control of land policy by the Legislative Assembly, but nowhere in the Seventh Report of Grievances is there any mention of the Heir and Devisee Commission.

10. Mr. Justice Macaulay entered a caveat in the case of Abraham v. Asahel Culver (11 July 1826), as the Minute indicates: "Decided in favour of Abraham Culver. with Mr. Justice Macaulay dissenting on the ground that Asahel Culver could rebut the alleged adherence to the enemy & is in search of such testimony." (It was testified that he defected to the Americans in the War of 1812-15.)

Notices of claims had to be posted for a period of at least thirty days in the office of the Clerk of the Peace, or, under certain conditions, in the district Court House,[11] and were read by the Court Crier directly after the charge to the Grand Jury. All claims had to be carefully documented by records such as land certificates, deeds of bargain and sale, mortgages, birth, marriage, or death notices, affidavits sworn before a Commissioner appointed for the taking of oaths, family letters, receipts, or any other type of evidence. The Commission was also empowered to subpoena witnesses to give oral testimony.

At the close of the sittings, an official report was sent by the Clerk to the Lieutenant Governor in Council showing in tabular form the claims heard before the Board and the decisions reached.

Various later acts of 1808, 1812, 1816, 1819, 1823, and 1829 made minor changes or continued the Act of 1805 as amended. In 1822 the Solicitor General, upon request, gave his legal opinion that "Provincial Statute 59th George 3, Chap. 21, has thereby rendered the latter Act perpetual."[12]

Sittings were at first held for ten days in March and in June; later they were confined to fifteen days in July with power to adjourn if there was not enough business for the full period of time. The place of meeting was normally the Executive Council Chamber of the Court House. At the first meeting in 1805, John Beikie,[13] Deputy Clerk of the Executive Council, was appointed Clerk to the Commission and a schedule of fees which he was authorized to collect was approved by the Commission in lieu of salary. Special Commissioners were appointed in every district for taking oaths, but by an amendment of 1829 such affidavits could be taken by Commissioners in the Court of King's Bench.

In 1837, abolition of the Heir and Devisee Commission was contemplated with the establishment of a Court of Chancery under Vice Chancellor Robert S. Jameson. W. H. Draper was made Chairman of a Select Committee of the House of Assembly to consider the advisability of transferring all land claims to the new Court. The committee sought a wide variety of expert opinion on this subject, and reported back to the Assembly on 27 February 1838.

The main arguments for dissolving the Commission were that it first came into being because there was no court of equity such as the Court of Chancery.

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11. The Act of 1805 required that notice of claim be posted in the office of the district Clerk of the Peace; notice of a claim as an assignee of an heir, devisee, or assignee, according to the amended act of 1823, had to be posted in the district Court House.

12. H. J. Boulton to Major Hillier, A.D.C. Copy of letter entered by Beikie at the end of Minute Book I.

13. Beikie seems to have eluded all biographical compilers. He was born at Gibraltar, 14 February 1766 (see PAO "Beikie Bible"), came to Upper Canada and settled near Cornwall, where he obtained, 1 September 1797, a Crown grant of 300 acres. He was commissioned Captain in the Stormont Militia, 3 October 1796, and rose to Colonel. He married Penelope, daughter of Miles Macdonald (PAO Misc. Ms. Col.); they had no children. In 1801 Beikie was appointed to a junior clerkship in the Executive Council office, York. He was promoted to First Clerk, deputy to John Small, the Clerk of the Executive Council, whom he succeeded in 1831. From 1811 to 1816, he represented Stormont and Russell in the Legislative Assembly, and also served with the militia during the War of 1812-15. He died 20 March 1839.

With the advent of the new court, the Commission lost its *raison d'etre*. The Vice Chancellor approved the transfer and believed it would not over-burden the court. Delays would be obviated and efficiency increased.

There were cogent reasons, however, for opposing the change. In the first place, Commissioners had been given by statute greater lattitude in the examination of evidence than a court of law, an important consideration in view of the many irregularities in land transfers. Then, too, it was estimated that the average cost to claimants would be almost doubled in a Court of Chancery. As the Commission met only once a year, it was true that deferred claims were long delayed but there was no general complaint about this. And finally, as the Chairman's report pointed out, dissolution of the Commission would "deprive the present Clerk of the Commissioners who appears to have discharged his duties in a most satisfactory manner of the income derived from this office, a step which ought not to be taken on slight grounds." Unable to reach a firm decision, the committee recommended a year's delay, and the Assembly ordered publication of the various depositions made before the committee.[14]

Asked by the committee to supply statistics for the three years, 1835 to 1837, John Beikie reported that during this time 590 claims came before the Commission. Of these, 448 were allowed, 27 disallowed, and 115 deferred. There was an increasing amount of business as indicated by the fact that 164 claims were entered in 1835, 171 in 1836, and 255 in 1837. Beikie further reported that his average annual income from fees was £116.15.0.[15]

In his report to the committee, Mr. Justice J. B. Macaulay, one of the senior members of the Commission, emphasized some of the weaknesses of the system. A whole year's delay when a claim was deferred could cause an unnecessary hardship for the claimant. And because fifteen days was not long enough to transact "an increasing amount of business", the tendency was to postpone cases that were complex and difficult to adjudicate. Indeed it was his opinion that "the whole proceeding is too rapid and summary for the rising value of the interests involved." Wider publicity should be given the notices of claims; it was not enough to post them in the district Court House or office of the Clerk of the Peace. And his final argument was that "intricate controversy sometimes arises touching Pedigree, Identity, Fraud or Forgery and such like, calling strongly for a regular judicial investigation." His solution to these problems was the appointment of a new tribunal of three members — the Vice Chancellor, the Surveyor General, and the Commissioner of Crown Lands — to meet weekly throughout the year and report directly to the Lieutenant Governor.[16]

The Legislature, however, was disinclined to make any change, presumptive evidence that, despite delays, the Heir and Devisee Commission had given general satisfaction. The fact that no action was taken on the proposed dissolution was

14. U.C. Legislative Assembly, Journal, 13th Parl., 1837-38. Appendix, v. 1, 253-257.
15. *Ibid.* p. 255.
16. *Ibid.* p. 254.

a vote of confidence in its proceedings and in the integrity of its long-time first Clerk, John Beikie.

As for the actual working of the Commission, a review of a number of cases that came before it will show a variety of problems and how they were dealt with by the Commissioners.

First, the relatively simple claim of Benjamin Marsh in 1833 to 200 acres in Fredericksburg and 200 in Clarke townships, as heir at law of his late father, Corporal Joseph Marsh of the King's Rangers.[17] Now one problem in this case was that Governor Haldimand, on 23 September 1784, had signed the original land Certificate, when Joseph Marsh was a Private and, as such, entitled to only 200 acres, whereas his promotion to Corporal made him eligible for a total of 400 acres. But having settled on his Fredericksburg lot, Marsh had enough to do in clearing the land without bothering to enter a claim for an additional grant. In due course, he married, had a son, Benjamin, and within a few years had the misfortune to die of exposure during a very severe winter. His widow later remarried. When he came of age, Benjamin inherited his father's homestead and then found he was entitled to a grant of a further 200 acres which his father had failed to claim.

In 1833, he therefore engaged Peter Perry, his local M.L.A., to act as his agent in acquiring letters patent to the land that was rightfully his father's. Perry petitioned the Lieutenant Governor in Council "for such portion of land . . . as shall be found due to the said Joseph Marsh to complete his complement for his services, family land, &c." As supporting evidence he enclosed the Haldimand Certificate, crossing out the words "Private" and "two hundred acres" and substituting in pencil, "Corporal" and "four hundred" acres".

From the successive jottings endorsed on the back of the Certificate, we can trace what happened to it. It was first read by the Civil Secretary, whose annotation reads: "Referred to Surveyor General for information of Executive Council." Beneath this is a note by J. Radenhurst, Chief Clerk in the Surveyor General's Office as follows: "Joseph Marsh, O[riginal] N[ominee], Lot No. 9, 4th Con. Fredericksburg Additional, 200 acres. I do not find any other grant or Order in his favor lodged in this Office." The Certificate, along with the petition, then came before Lieut. Governor Colborne in Council. Another endorsement was now added to the back of the Certificate by Hon. Peter Robinson, the Commissioner of Crown Lands: "As petitioner for this is the Original Nominee for the whole of Lot No. 9 in the 4th Con. Fredericksburgh (sic), it can be claimed before the Heir & Devisee Commission," (11 January 1834).

This information was communicated to Peter Perry (28 January 1834). But meanwhile, after re-checking with the Surveyor General, Council reconsidered the petition. Peter Robinson now appended a second note, more specific than the previous one: "As claiming for military and family lands was by Proclamation to have ceased in August 1797, the period was afterwards extended, but only to

17. 1835, Parcel 40, Box 20.

the parties themselves, by the Notice of May 1806." Thus, on a strict interpretation of the law, the claim was invalid when made as late as 1834 by the son of the Original Nominee. Council, however, took a lenient view and on 3 February 1834 endorsed the petition as follows: "Recommend that a Location be made for the remaining quantity due in the name of Joseph Marsh to be claimed before the Heir & Devisee Com." (signed) John Strachan. Four days later, an Order in Council instructed the Surveyor General to locate 200 acres in the name of Joseph Marsh. He located the property in Clarke township.

In order to claim this new lot as heir at law, Benjamin Marsh (or Peter Perry as his agent) had to post a notice of the claim with the Clerk of the Peace for the statutory thirty days preceding a meeting of the Commission. The notice included the claimant's name, his status vis à vis the Original Nominee (heir, devisee or assign), and the location of the lot in question. After the mandatory length of time had elapsed, the notice was taken down, certified on the back by the Clerk of the Peace, and returned to the claimant or his agent. It was then forwarded with other supporting documents to the Clerk of the Commission, John Beikie, who noted, on the back fold, the date of receipt, the names of the claimant and his agent, and the number of the claim among those to be presented at the next sitting.

To support the Marsh claim, Perry submitted the original petition to the Lieutenant Governor in Council, the Haldimand Certificate, and a certificate of search in the Surveyor General's Office, signed by S. P. Hurd, the acting incumbent: "I certify that the North ½, Lot 32, 5th Concession, North part of Lot 18, 6th Concession, South West part of Lot 18, 7th Concession, Township of Clarke, in the Newcastle District were located by special permission of His Excellency the Lieutenant Governor in the name of Joseph Marsh under an Order in Council, 7 Feb. 1834, for 200 acres of land to make up his quantity as Corporal in the King's Rangers in order to be claimed before the Heir and Devisee Commission, no part whereof has been described."

The claim was read, 7 July 1835, at a meeting of the Commission chaired by Chief Justice Robinson who made the final annotation on the docket: "Claim allowed" (signed) Jno. B. Robinson.

A review of this case reveals a number of points. In the first place, after completing his settlement duties, Joseph Marsh neither exchanged his land certificate for letters patent, nor applied for the additional 200 acres of land to which he was entitled. The lot in Fredericksburg was therefore, in legal terms, still Crown property until Benjamin Marsh, as heir of the original nominee, secured a deed to the property, through the Heir and Devisee Commission. The Commission, however, had no authority to grant additional land, however strong a claim could be made. Land grants were the prerogative of the Lieutenant Governor in Council. Hence the petition to Sir John Colborne. If the Executive Council recommended a grant, then the Commission could act.

A second case involved a minor, Mary Ann Bowman, left an orphan upon the death of her father, John Bowman, the Original Nominee of Lot No. 7 in broken Concession "C", Murray township. Too young to look after herself, the child was cared for by Mrs. Frances Sandrigan of Kingston who treated her, it was testified, "with maternal tenderness and affection, but her unfortunate circumstances obliged her to put out the child to service." In return for looking after Mary Ann, Mrs. Sandrigan claimed that the child's late father had agreed to assign his farm to her. When the claim was first read, 11th July 1827, it was "deferred for further proof of the existence, maintenance, and treatment of Mary Ann Bowman, the proof to be taken before the Commissioner appointed to take affidavits under the Heir, Devisee and Assignee Act."

Mrs. Sandrigan's circumstances were not so unfortunate as to preclude engaging an attorney, even one as well known to the Commission as George Ridout. He produced four affidavits, all taken before Allan McLean, a Kingston Commissioner. Beikie's minutes indicate their nature:

"Affidavit of Thomas Maclair as to kind treatment of Mary Ann Bowman, 1821-24; Affidavit of Michael Moran — deponent declares on all occasions within his observation the Claimant did treat Mary Ann Bowman with maternal care . . .; Affidavit of Mary Ferris corroborates that of Thomas Maclean; Affidavit of John Snider says that more than four years ago, Mary Ann Bowman, then in an inferior state of health, came under his care, since when she has nearly got rid of her infirmities, and that his care and attention to this child arises from motives of compassion and humanity . . ."[18]

Taking into consideration the fact that Mrs. Sandrigan cared for Mary Ann for only four years, after which she was no longer a charge upon her, the Commission awarded one third of the Bowman property to her, the other two thirds to Mary Ann when she came of age.

The Commissioners were used to this type of claim as it was common practice for a man of advanced age who was no longer able to look after himself to assign his property to a relative or neighbour in return for room and board and nursing service. Many such cases are found among the claims from 1805 to 1841.

Sometimes an ambiguous will, carelessly drawn, posed a very difficult problem in adjudicating a claim and counter claim. A case in point was that of Bingham v. Marr, each man claiming to be the heir at law of William Smith deceased. Smith's will was difficult to interpret. He left his property, in the London District, to his wife, and at her death to his "right heir" (his sister's eldest son in England) provided he come to Canada to settle on the farm before his wife died. Failing this, the land was to go to his wife's relatives, or, he adds, "if any of my relations should come from England before the death of my beloved wife, Sarah, then after her death for them to become heirs to the . . . property."

18. Minute Book Ia, 11 July 1827; 16 July 1828.

A few weeks before he died, William Smith married a second time. Learning of his uncle's death, the "right heir", William Bingham, came out to Upper Canada but was very coldly received by the second Mrs. Smith who would not let him occupy the property. In frail health, he moved to the Niagara district and soon afterwards died. A younger brother, George, then left England to press his claim to the homestead but before he reached it the Widow Smith had died, and her brother, Thomas Marr, had taken possession of half the lot. George Bingham, under Marr's protest, promptly moved into the other half. Both men then entered claims before the Heir and Devisee Commission for the entire property, claims deferred on 17 July 1837, and again on 11 July 1838, before the case was finally adjudicated, 20 July 1840.

The proceeding in this case was far from "summary". Chief Justice Robinson studied all the documents submitted with scrupulous care and drew up a report in longhand which covers four pages of foolscap. An important legal statement, it clearly distinguishes the powers of the Commission contrasted with those of a Court of Law:

> We have no authority to vary the testator's intention — we cannot make a will for him, nor can we rightly rescind any disposition which he has made. The powers of the Commission do not extend so far. But we may, for the purpose of giving effect to the intention of the testator . . . assume a latitude greater than Courts of Law allow themselves. They, it is true profess to follow the intention of the will in all cases, but in order to assist them in arriving at that intention, they have laid down certain rules of construction which assign a certain effect to certain words, and to these rules they adhere even though they feel that in some particular cases they are led by their maxims to contravene the intention of the testator.
>
> This Board, under the very extensive powers given to them by the Statute, have in numerous instances disregarded the rules referred to in order to reach what they deem to be the meaning of the testator . . . . If I can discern clearly what this testator desired should be done with his property, I should think it right to follow that as our guide altho' it may give the whole a different direction from that which w^{d} be given to it in a Court of Justice bound by ordinary rules.
>
> Now here the following points seem clear:
> 1) The first objects of the testator's bounty after his wife should cease to exist were his own relations;
> 2) Among these he intended to prefer the right heir,
> 3) With this proviso, however, extending to all — that in order to become entitled to his estate, some one of these relatives must come to this Province before his wife's death.
> 4) There seems to be an intention in the will (tho' not consistantly discovered throughout) that the estate shall be entailed in the male issue of the devisees.
>
> I do not believe that the testator intended that a race might be run between or among the relatives on his side living in England . . . [However] to give to his sister in England in preference to his wife's relations living in Canada w^{d} be, I think, a contravention of his will, but that seems to be the inevitable consequence of giving effect to the terms of the will; . . . he did not mean that his relation coming out and dying w^{d} forfeit his interest — at least we cannot say that he did.

What action, then, should the Commission take in this matter? The Chief Justice makes a personal recommendation for the consideration of his colleagues:

> On a view of the whole case it seems to me, under the expectations raised by a will of which the construction is subject to doubt, the two claimants, the wife's relation on the one side and a claimant of the blood of the testator . . . have taken possession, and though each claims the whole, their possession has been in fact confined to separate halves of the property. A grant to either in exclusion of the other would, I fear, work a hardship under the particulars of this peculiar case, and it might be recommended, therefore, to the parties to come to an amicable arrangement before the next sitting of this Commission, and if they fail to do so the Board will then decide the case as they may think the facts compel them to do.[19]

But Robinson's fellow Commissioners, Judges J. B. Macaulay, C. A. Hagerman and Archibald McLean, however impressed they may have been by this judgement of Solomon, were unwilling to hold over for another year a claim which had already been twice deferred. Accepting the "inevitable consequence" of the Chief Justice's interpretation of the actual terms of the will, they awarded the property not to Thomas Marr or to George Bingham but to the testator's sister in England, though her son George continued in occupation, taking over the Marr half of the property as well.

In view of this carefully considered judgement, as well as many others that could be cited, it is difficult to attach much weight to Macaulay's criticism that claims were handled in a summary or cavalier manner. It is true that on some occasions what seems like an unconscionable number of claims were processed in a single day's sitting, as many as thirty or forty. But, in such cases, if one examines the dockets themselves, it becomes apparent that the bulk of these quickly-processed claims were perfectly straightforward without complicating factors.

For the smooth working of the Commission, much, of course, depended on the preliminary work done by John Beikie. As Clerk to the Commission, he assembled the documents for each claim and was in a position to inform the Commissioners of any irregularity or point in dispute. Indeed, he became so expert that claimants would seek his advice and accept his opinion. If he thought they had a weak case, it was scarcely worthwhile proceeding, as witness the following note in the Minute Book: "Returned papers to George Charters, 10th July 1822, having examined them first and saw nothing in them whereby the claim could possibly be allowed by the Commissioners."

Problem cases were invariably given close attention and were often deferred until more convincing evidence could be produced. Thus, for example, in 1827, when George Clifft of Fredericksburg township claimed as devisee the neighbouring farm of John Cocker, deceased, the Commissioners were not at first satisfied that the Crocker will, produced in evidence, was genuine. The case was thus held over for better documentation. "This claim," the Minute states, "is supported by due Notice & Certificate of Location, and a paper purporting to be the Will of the O.N. who was a Serjeant, but the Will all in the Handwriting of Thomas Connor with only the mark of the Testator and the doubtful signature of John Milladge.

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19. 1837, Parcel 49, Box 24; 1840, Parcel 60, Box 30. Chief Justice Robinson's summary should have been bound up with the Minutes for July 1840, but by mistake was filed with the docket.

The Board is desirous to place as little obstacle as possible to this Claim by a neighbour and comrade but requires some evidence that Cocker is deceased & died without children & that Dennis Gingley & John Milladge were known to be unable to write, on filing which, Claim [will be] allowed."[20] Two additional affidavits covering these points were duly filed and the claim allowed.

A few years earlier, in what looked like a case of fraud by which an uncle deprived his niece of her lawful inheritance, letters patent for a lot in Townend township, allowed to Peter Buckner in 1817, were ordered withheld by the Commission in order that the niece, Mrs. Elizabeth Buck, could enter a counter claim. The apparent fraud was called to Beikie's attention by Mrs. Buck's agent, Crowell Wilson, who, in a letter of 29 June 1818, produced circumstantial evidence that his client had been victimized. Wilson also brought the case before the Attorney General and Buckner was charged with fraudulent intent. At the Niagara Assizes, however, he was acquitted, and his attorney, George Ridout, immediately wrote to Beikie to show cause why the deed to the Townsend property was still being withheld. Although Mrs. Buck in her counter claim was able to produce affidavits to the effect that her uncle had got her to sign papers under false pretenses, when she was an innocent school girl, making over the property to him, the fact that he had been acquitted in court gave the Commissioners no alternative than to lift the suspension and confirm their original award.[21]

A more flagrant case of undue influence involved a member of the Legislative Assembly, Joshua Cornwall. When one of his constituents William Libby (or Labby), was on his deathbed and in a delirious state of mind, he was visited by Cornwall who was alleged to have induced him to sign a prepared will making him the sole heir and beneficiary. However, two of Libby's neighbours, Clark and Madson, who had tended him in his last illness, testified that "when he was in his perfect senses" he had expressed the wish that in event of his death his property should go to his son in England. It was this son, William Libby, Jr. who was the claimant and in whose support Clark and Madson had signed affidavits.

The claim was first read before Archdeacon Strachan, Judge D'Arcy Boulton and Thomas Ridout on 11 July 1820, read again on the 13th and for a third time on the 17th. On the latter occasion, the Minute indicates, "Mr. Patrick Strange, agent for Joshua Cornwall, came before the Commissioners to state that although he had not brought a counter claim, he was prepared to lay before the Board a copy of the Will of William Libby, deceased . . . dated 7 Sept. 1816, leaving the land to J. Cornwall, aforesaid." Cornwall's decision not to enter a counter claim may have been taken as evidence of guilt. At any rate, the Commissioners allowed the claim to William Libby, Jr., on condition that he file with the Clerk of the Commission "one or two other affidavits corresponding with those of Thomas Clark and Thomas Madson."[22]

20. 1825, Parcel 17, Box 8.
21. 1822, Parcel 12, Box 6.
22. 1820, Parcel 9, Box 5.

The final record in this docket is a copy of a letter addressed by John Beikie to John Small, Clerk of the Executive Council:

> York, 8 November 1820
>
> Sir
>
> In conformity to the Decision of the Commissioners under the Heir and Devisee Act on the 17th July 1820, upon the Claim of William Libby to Lot No. 30 in the 1st Concession of Westminster, Claim No. 67 Report Q, the Claimant by his Attorney, George Strange Boulton, Esquire, has this day filed with me two Affidavits corresponding with those of Thomas Clark and Thomas Madson.
>
> I have the honor to be Sir
> Yours most obedient
> Humble Servant
> (Signed) John Beikie
> Clerk, Commission
>
> To John Small
> Clerk, Executive Council.

One can see the validity of Mr. Justice Macaulay's point that forgery and fraud should be the subject of judicial investigation, whereas the Commissioners were concerned with them only in so far as they affected property rights. Questions of family relationship and identity were in a different category, although here, too, fraudulent claims were sometimes made. To establish the right heir, birth, marriage, and death records, wills, affidavits of persons long acquainted with the family, and other evidence could be produced. If not satisfied, the Commissioners could disallow the claim, defer it for better documentation, or allow it on condition that additional affidavits be filed with the Clerk.

The following Minutes illustrate these options:

> *9 June 1810*: "Affidavit of Ruth Smith states that she was present at the marriage of Jonathan Bedford Senior with Elizabeth Dean and that claimant is now the eldest son, & also that she believes Paul [an elder brother] died some years ago having no issue. Proof not sufficient; claim dismissed."
>
> *13 July 1832*: "Deferred for proof whether Jeremiah Stormes was legally married to Mary Lloyd (formerly Crane); that depends upon whether Lloyd was dead when Mary Lloyd married Stormes. If so, or from his long absence unheard of he could be presumed to be dead, then her male heir of that marriage w^{d} be heir to this land in preference to Anne Connor. The parties directed to give clearer evidence on this point & to furnish any additional evidence they can as to the alleged gift by Crane or his Daughter of this land to Elisha Stormes, because if that be proved to the satisfaction of the Board, he w^{d} be entitled as Assignee."
>
> *20 July 1840*: Allowed on affidavits being filed that the two deceased daughters died without issue.

Allowance was often made subject to the conditions of a will. This was normally assumed, but sometimes the conditions were spelled out, as in the award to Mrs. Frances Moodie, 13 July 1840. Her husband, the late Col. Robert Moodie, had been fatally shot by the rebels at Montgomery's Tavern, as the Commissioners knew. The Minute covering this case is specific:

> Allowed to Frances Moodie for her life, and after her death to Frances Haig, wife of Robert Haig of the City of London, Elizabeth Moodie, now Elizabeth Halkett, George

Moodie, John Randolph Moodie, and Georgina Isabella Moodie, the children mentioned in the will of Col. Robert Moodie, deceased, dated 20th Nov. 1835, or to such of them as shall be living, of the age of twenty-one years, at the time of her death.[23]

The last will and testament of another, more notorious, military officer, Brigadier General Benedict Arnold, had been equally specific about the disposition of his property in Upper Canada after the death of his widow, but settlement in favour of the heirs was long delayed. On direct orders from the Duke of Portland to Peter Russell as Administrator of Upper Canada, Arnold had been granted 13,400 acres of choice land for defecting to the British.[24] The grant specifically exempted him from the normal conditions of settlement on the land. In point of fact, two sons, Richard and Henry Arnold did settle in Upper Canada, but on their own land grants as half-pay officers. Their mother had obtained letters patent to less than half of her late husband's property, at the time of her own death. But in 1810, when Henry Arnold, on behalf of his brothers and sister, applied for deeds to the remaining 8,500 acres of family land in North and East Gwillimbury, he was informed by the Clerk of the Executive Council that the surviving executor of his father's will would have to obtain powers of attorney from the children and then apply, as trustee, to the Heir and Davisee Commission. This was a hard condition to meet as the family was widely dispersed; two brothers were in India, one in England, and the other two in Upper Canada, and their sister in the East Indies. Daniel Coxe, a prominent English barrister and surviving executor of General Arnold's will, objected, in a letter to Henry Arnold, that the condition made it "almost impossible to procure any application to the Commissioners under your Heir & Devisee Act." He saw no valid reason why titles and patents should not be made out "agreeably to your Father's will, *litteratum et* verbatim."[25] But the Executive Council would not have it so. In the course of the next few years the required powers of attorney were obtained, and the case, initiated in 1810, was not finally disposed of until 4 July 1822, an ironical date for settling the Benedict Arnold claims.

A recurrent problem for the Commission was what to do about so-called "squatters' rights". It could be argued, of course, that squatters had no rights at all, certainly none that would stand up in a court of law. But the Commissioners took no such dogmatic position; each case was considered on its own merits. Some claims were allowed, others disallowed. Let us look at two typical cases where long and undisturbed possession of property, which the claimants had improved and on which they had built homes, seemed to lend some validity to the popular expression that "possession is nine tenths of the law".

The first is the case of Staards v. Hudgins,[26] each claiming the east half of Lot 12, 1st Concession, Marysburg township, a claim and counterclaim first entered in 1833 and twice deferred for additional evidence before it was finally settled in 1835. Jacob Staards claimed the lot as the assignee of Henry Rimmer-

23. 1840, Parcel 64, Box 32.
24. 1822, Parcel 12, Box 6.
25. Barnes Terrace, Surrey, 12 Sept. 1810, Daniel Coxe to Henry Arnold.
26. 1835, Parcel 41, Box 20.

man, the Original Nominee, who, in his old age made over the lot to Staards in compensation "for taking care of him during his sickness and having him decently interred at his decease and paying his debts." After Rimmerman's death, Staards agreed to sell the property to James Hudgins. The latter made a small down payment, but suspecting that Staards had no legal claim to the lot, he paid no more. His suspicion was confirmed when he was not disturbed in his possession of the property and was allowed to build a house, clear the timber, and improve the land. Some twenty years later he was startled to read an official notice by the Crown Lands Department that the lot was to be sold at auction for back taxes.

In his claim before the Heir and Devisee Commission he testified that Staards offered to let him have the land if he paid up the taxes. Staards, however, told a different story, namely that Hudgins said he would lay no claim to the property if he were paid for the house he had built. But he, Staards, declined to do this on the grounds that Hudgins had lived on the land rent free and had cut and sold all the valuable timber on it.

Both claimants rounded up friends and neighbours to support their respective claims. Hudgins also wrote a personal letter to John Beikie offering to pay the Land department a reasonable price for the lot, but warning him not to be misled by the "duplicity of old Mr. Staards" or by the "poor flimsy testimony" of old Mrs. Edwards, a negro woman who had known Rimmerman and whose affidavit substantiated Staards' claim to be the legal assignee. She was too feeble in mind and body to have any clear recollection of the past, or so Hudgins alleged. But his opponent had anticipated this attempt to discredit Mrs. Edwards and had obtained sworn statements by two justices of the peace who had long known her as "an intelligent woman of good memory and whose testimony under oath is deserving of credit."

The pros and cons of this case were fairly evenly balanced, but on 16 July 1835 the Commissioners finally found in favour of Jacob Staards as the assignee of the Original Nominee whom he had looked after in his old age. He had offered to sell the lot in question to Hudgins, but had not evicted him for failure to make payment.

Two years later, under different circumstances, the Commissioners confirmed a squatter in possession of his lot, a judgement for which there was ample precedent. In this case, the claimant, Price Mallory, had occupied land in St. Vincent township originally set aside as a Clergy Reserve. In 1826, however, the land had been located in the name of Capt. W. C. Rochfort as part of his military grant, with the usual proviso of residence on it. Rochfort had not occupied the lot, and when a representative of the Crown Lands Department inspected it, he found Mallory in possession and reported that he had "three acres cleared and cropped, two acres chopped and partially cleared, a good log house 18' x 24' hewed on the inside, with stone chimney, shingled plaistered, two good floors, doors, windows, cupboards, etc., another small log house of the ordinary kind."[27] On 8 December

27. 1841, Parcel 70, Box 34. (The petition of 1836 and claim of 1837 were filed with a later and unsuccessful claim of 1841.)

1836 Mallory petitioned the Lieutenant Governor in Council to grant him this lot in view of the work he had done on it at heavy expense.

The decision of the Council was that since the petitioner had "made considerable improvements, it is respectfully recommended that the location to Capt. Rockfort be rescinded and the location in favour of the Petitioner confirmed". Mallory was advised to enter a claim before the Heir and Devisee Commission, and in July 1837 he gained legal title to the land he had occupied and improved.

It was said of the first Heir and Devisee Commission that "men deeply interested in a lax interpretation of the law were appointed to administer it . . . and passed on one another's certificates."[28] Can this same charge be made against the second commission? Did the Commissioners all more or less closely identified with the Family Compact, bend the rules to favour fellow members of the governing clique? A number of such claims came before the Commission in the period from 1805 to 1841, but in no case have I found any evidence of favouritism. On the contrary even more stringent criteria seem to have been applied to these claims and unless the evidence was unmistakable the cases had to lie over for further proof.

A case in point was the claim of Henry J. Boulton which came before the Commission on 10 July 1832. The Commissioners were Boulton's brother-in-law, Chief Justice Robinson, his friend and former schoolmate Hon. Peter Robinson, and his former teacher Dr. John Strachan. Appearing before such a tribunal, Boulton doubtless felt confident that his claim to a city lot in York (No. 5, north side of Front Street) as "assignee of Rowland Wimburn, who was devisee of the late Joseph Genevieve De Puisaye, Count De Puisaye the Original Nominee," would automatically be allowed. But the Minute, signed by the Chief Justice, states: "The Commissioners cannot recognize the claimant as assignee of this lot according to the terms of the claim."[29] Two years later when Boulton had prepared more careful documentation of his claim it was finally allowed.

When Hon. Peter Robinson, himself a Commissioner, entered a claim in 1834 to certain parcels of land inherited from his father, he did not attend the Board. Chairman Macaulay noted on the Notice of Claim: "Deferred for further proof." Four years later, such proof was given in minute detail by Chief Justice Robinson who drew up a long memorandum for his fellow Commissioners in which he analyzed his father's land transactions seriatim and also testified under oath, what was already well known to the Board, that his father, Christopher Robinson, was deceased and that Peter was the eldest son and heir at law. A copy of this affidavit was inserted in the Minute Book. The rules had been scrupulously observed; the documents were in order; the Commissioner of Crown Lands, Hon. Peter Robinson, finally obtained his letters patent.

John Solomon Cartwright, if only a fringe member of the Family Compact, was a former pupil of John Strachan and a friend of most of the Executive Councillors. His father, Hon. Richard Cartwright, had been a member of the

28. Gates, "Heir and Devisee Commission . . ." *op. cit.* pp. 31-32.

first Commission, but, oddly enough, had neglected to obtain letters patent for 1200 acres of land ordered to be located in his name for his services as Colonel commanding the Militia of the Midland District in the War of 1812. His eldest son, Thomas Robison Cartwright, was equally negligent, and neither he nor his father had devised the land in their wills. As the eldest surviving son, John Solomon, preferred a claim to the property, having obtained an affidavit from his brother, Rev. Robert David, renouncing on his own and his married sister's behalf, any interest in the grant. He seemed to have a clear title, but knowing he could expect no favours, he engaged as his agent John Radenhurst, Chief Clerk in the Surveyor General's Office, to whom he wrote, 16 July 1834: "I send you a copy or rather the Probate of the Wills of my Father and Brother, from which will be seen that the property was not devised; also the affidavit of my brother Robert which I fancy is quite sufficient. Mr. Hagerman could supply anything further or the Archdeacon should it be requested."[31] It may have been helpful to have friends at court, but only if their testimony could substantiate a well-grounded claim.

Another Kingston protégé of John Strachan, Hon. John Macaulay, a Family Compact man of all seasons, found out that this conferred upon him no special privileges. A close personal friend of C. A. Hagerman and the Robinson brothers, he had done yeoman service for the Tories as editor of the influential Kingston *Chronicle*. Having served the government in various capacities, he was appointed Legislative Councillor in 1836, and on 19 February 1837 became, for a brief period, Surveyor General before his appointment as Civil Secretary. As Surveyor General he attended meetings on the Heir and Devisee Commission.

A good administrator, Macaulay sought to expedite the issuing of letters patent in order to reduce the long backlog in the Surveyor General's office. He was also a compassionate man, and when an indigent widow, Elizabeth Key, complained that the deed to her late husband's land grant in Orillia township, for which he had applied before his death, had never been issued, the paper work was rushed through. This action, however, brought down upon Macaulay's head a severe censure by his friends on the Executive Council for exceeding his authority. The Minute of 16 November 1837 states: "The Council beg most respectfully to express their disapproval of the course said in this instance to have been pursued in the Surveyor General's Office, namely location in the name of a deceased person without authority . . ." Underneath is a pencilled note by Sir Francis Bond Head: "To be communicated to the Hon. the Surveyor General."

It now remains to comment upon the extant records of the Second Heir and Devisee Commission up to the formation of the Province of Canada in 1841. There are, first of all, three bound Minute Books of unequal size numbered I, Ia and II.[32]. As Clerk of the Commission, John Beikie presumably began keeping

29. 1834, Parcel 35, Box 17.
30. 1838, Parcel 53, Box 27.
31. 1834, Parcel 35, Box 17.
32. Book II bears the binder's label: "Canada Gazette Office, Cor. St. Gabriel & St. Therese Streets, Montreal."

Minutes at the first meeting on I June 1805, but for the first five years no Minutes have survived. The official reports of the Commission based on the Minutes are, however, complete. Those in the Archives are the Surveyor General's copies; a third copy went to the Attorney General (1823-37) and a fourth to the Inspector General (1824-30), but in 1837 the original practice of only one copy, for the Surveyor General, was approved. The reports were inscribed on large ruled sheets, roughly 14" x 18" divided into ten vertical columns headed: 1) *Number of Claim,* 2) *Name of Claimant, Residence, Addition &c.,* 3) *Lot Number,* 4) *Concession Number,* 5) *Town,* 6) *Township,* 7) *District,* 8) *Number of Acres,* 9) *Original Nominee,* 10) *Date and Decision.* The reports were signed by the Commissioners and certified by the Clerk. When endorsed by the Lieutenant Governor, an Order in Council authorized the Surveyor General to issue letters patent for the claims allowed. The reports from 1805 to 1808 (including two sittings in 1806 and two in 1807) are numbered 1 to 6. The next report was first numbered "7", but for some reason the numeral was erased and the letter "A" substituted, beginning a new alphabetical sequence A - Z, followed by AA - ZZ and so on. A folio report book was also kept in Beikie's office.

Beikie's Minutes were taken down on plain legal size paper as each case came before the Commissioners and were not bound up in book form until much later. The careful handwriting and neatness of the early entries suggest that they may have been transcribed after the meetings from rough notes; later, as he became more proficient and more hurried, he got down the essential points in sufficiently legible form without having to make a fair copy. Minute Book I begins with the meeting of 13 March 1810 and is headed REPORT D. The place of meeting is given as "Government Buildings, York", and those present, Chief Justice Thomas Scott, Hon. John McGill, and Alexander Wood, Esq. "No claimant appearing, the Board adjourned til tomorrow at 11 o'clock." Beginning next day, the claims are numbered consecutively for each report. (A slip of paper pasted on the fly leaf of the volume states: "The number of Claims Reported under the Heir & Devisee Act from 1805 to 1817 inclusive is 336.")

Reports D to N (1810-1815) are paginated 1 - 91 and are on slightly larger paper than the rest of the volume. M. to Q (1816-1820) form a new section, pp. 1-138; R (1821) is another separate section, pp. 1-19, followed by S (1822), 20pp. The Minutes then skip to Reports Y and Z (1828-1829) pp. 1-226. Tipped in at the end of the volume are a table of fees allowed to be taken by the Clerk of the Commission, and a copy of Solicitor General Boulton's opinion of 15 June 1822 that the Heir and Devisee Act had been rendered perpetual.

Minute Book Ia is a slim volume of 180 pages including Reports T, U, V, and W (1823-1827), unaccountably omitted from Book I. This may have been a binder's error, or the Minutes may have been temporarily mislaid when Book I was sent to the bindery and separately bound when they turned up later on.

Minute Book II (1829-1845), a massive volume, represents a new departure, for the minutes are no longer in John Beikie's hand although he continued as

Clerk until 1839. Instead, we have the rough notes made during the sittings by the respective chairmen, always members of the Bench. These notes had originally been folded and filed, the outside fold inscribed "Chief Justice Robinson's Minutes under the Devisee Commission" or "Mr. Justice James Buchanan MacAulay's Minutes", or "Mr. Justice Jones' Minutes under the Heir, Devisee and Assignee Commission", and so on. When the identifying wrappers are not bound in, it is sometimes difficult to distinguish between the remarkably similar handwriting of Robinson and Macaulay; other hands, more clearly distinguishable, are those of Jonas Jones, Levius P. Sherwood and Christopher A. Hagerman.

When the work of the Commission became particularly heavy, as it did in 1840, with claimants anxious to obtain deeds before the union of Upper and Lower Canada, long sittings would be broken by having a new Commissioner take the chair. Thus in the Minute Book we find two sets of minutes for 7 July 1840, (Robinsons's and Jones'), and two sets for 15 July, (Robinson and Macaulay's). Each Chairman numbered consecutively the claims which came before him, and usually jotted down the date. But as a result of this system of changing chairmen the Minutes are not in strict chronological order and the numbers overlap. The proper chronological and numerical sequence, however, is restored in the official reports.

Why was it that after twenty-four years the method of keeping the Commission's Minutes changed? Are we to suppose that during his last decade in office Beikie sat through the hearings without taking notes, having somehow persuaded the chairmen to do this chore for him? To pose the question is to answer it. Beikie must have kept minutes, or rough notes, in order to prepare his reports. But whereas the early reports were as brief as possible, the Clerk gradually began including more and more detail in the "Decision" column, thus providing a summary review of each claim, or at least of the more complex claims. As these reports were made out in triplicate and in a fair hand, they were very much easier to consult than Minutes hurriedly jotted down while the Commission was sitting. Once the reports were compiled the Minutes were in fact expendable. The chairmen, however, for their own reference found it useful to keep notes that could later be used to check the accuracy of the Clerk's report. Beikie may well have destroyed his own rough notes after 1828. Thus, in 1845, when it was decided to bind the Commission's Minutes, the gap after 1828 had to be made up by collecting the Minutes, of the several chairmen. This is, of course, speculation, but some such hypothesis is necessary to account for the peculiarities and anomalies in the Minute Books of the Commission.

John Beikie died on 20 March 1839, a highly respected civil servant whose loss was so generally felt that the Legislature was adjourned to permit members to attend the funeral.[33] Indeed, the success of the second Heir and Devisee Commission was in large measure Beikie's own personal success. Had he lived two years longer, his term of service would have spanned the entire period up to the union of the two provinces.

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33. U.C. Legislative Assembly, Journal. 1839, p. 73.

A formal Minute Book would have recorded at least a brief tribute to a Clerk who had served so faithfully for thirty-four years. But the Commissioners paid their respect in other ways; the only reference in the Minutes is a brief jotting in Mr. Justice Macaulay's hand, 1 July 1839: "Mr. Beikie the late Clerk having departed this life since the sittings of the Commission last July, it was proposed that Mr. Lee, the present Conf Clerk of the Hon. Executive Council should be appointed to succeed him."[34] For many years Deputy Clerk of the Executive Council under John Beikie, William Henry Lee had been trained by him, and proved a worthy successor.

In the records of the second Heir and Devisee Commission, we have a largely untapped resource for the social and administrative history of Upper Canada. In wills and deeds, letters and affidavits, the dockets document the spread of settlement and the vicissitudes of the settlers.

They also provide an insight into the working of the government bureaucrasy. We see an enormous amount of paper work — minutes kept by the Clerk and the Chairmen, transcribed on dockets, and in annual reports produced in triplicate or quadruplicate, each one written out by hand; certificates of search in the Surveyor General's office, often requiring a check in several volumes poorly indexed at best. Fees had to be collected and recorded, and a distinction made between those who had to pay full fees and others, such as military claimants or U.E. Loyalists, entitled to exemptions. At a time when filing systems were rudimentary and offices moved from place to place, seldom with adequate protection from fire, the wonder is not that some records have been lost but that so much has survived intact.

Through the records one can trace the evolution of printed forms, strangely late in appearing. For twenty-five years or more all notices of claims, though they followed a set form, were hand written. Not until the 1830s did printed forms appear with blank spaces for names and lot and concession numbers; the same was true of certificates from Clerks of the Peace and the Surveyor General's office. Although deeds, leases, indentures and other legal forms were early available in print, as often as not they were laboriously and sometimes illegibly copied out by hand.

Finally in the actual working of the second Heir and Devisee Commission, we see the impact of a model civil servant, John Beikie, upon whose expert knowledge and efficiency successive Commissioners implicitly relied. In the Commissioners themselves we find a devotion to duty, an honesty and impartiality of judgement which their inveterate opponents could not call in question. For however intransigent or mistaken some of their political opinions may have been, in adjudicating property rights the Family Compact worked together for the common man and the common good.

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34. Lee's appointment was confirmed at the afternoon session, 1 July 1839: "The memorandum of the Hon^{ble} Mr. Justice Macaulay was approved of and it was resolved that William Henry Lee, Esquire, the Confidential Clerk to the Hon^{ble} the Executive Council be appointed Clerk to the Commission." (Handwriting appears to be that of Mr. Justice Sherwood.)

HISTORIC KINGSTON

No. 23

Being the Transactions of the Kingston Historical Society for 1974
Edited by H. Pearson Gundy

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Heirs, Devisees, and Assigns: A footnote to the social history of the Midland District

by H. Pearson Gundy

The subject of this paper is a spin-off from some research I was doing in the Ontario Archives last year. I was investigating the question of freedom of the newspaper press in Upper Canada—or lack of freedom—1793 to 1841.* And as so often happens in research, one bit of evidence or testimony opened up, unexpectedly, a whole new field.

I had been re-reading the work of an early commentator on the press in Upper Canada, *Winter Studies and Summer Rambles in Canada* by Mrs. Jameson, published in 1837, and was struck again by her statement: "Last year . . . 427,567 papers circulated . . . among a population of 370,000, of whom, perahps, one in fifty can read."[1] Now was it really possible that 98% of the population of Upper Canada in the 1830s could neither read nor write? Surely not! But how, I wondered, at this late point in time could one test, or at least more accurately determine, the extent of literacy in the province? I posed this question to John Mezak, the resourceful head of the Government Documents section of the Ontario Archives. He considered the problem and then suggested that one way would be to examine the written submissions to the Heir and Devisee Commission of Upper Canada. I could then see what proportion of the signatures to wills, affidavits, deeds, powers of attorney and so forth had to be marked with an "X" because of inability to write. The data, he explained, would come from a fair cross-section of the populace and from persons in all walks of life.

This sounded like an excellent suggestion, but first, I must admit, I had to find out more about this commission with the strange and unenlightening name concerning which I was totally ignorant. Its purpose I discovered, was briefly explained in the Act of Parliament which established the Commission: "An Act to afford relief to those persons who may be entitled to claim lands in this province as heirs or devisees of the nominees of the Crown in cases where no patent hath issued for such lands."[2] In other words its function was to determine property rights of descendants of the original settlers, or persons to whom Crown lands had been bequeathed, in cases where the original owners had failed to take out deeds for their lands.

Why had so many recipients of Crown grants not obtained letters patent or deeds for their land? The answer seems to be that they mistakenly regarded the certificates or location tickets which they first received as sufficient proof of their legal right to the land they held. But in point of fact, they were supposed to exchange these bits of paper, after they had completed certain prescribed settlement duties, for legal deeds describing the land as registered in the Surveyor General's office. Instead, they clung to their certificates, handed them down from father to son, used them to secure mortgages, or attached them to deeds of bargain and sale. Merchants

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* See the author's chapter on "Liberty and Licence of the Press in Upper Canada" in *His Own Man: Essays in Honour of Arthur R.M. Lower* (Montreal and London: McGill-Queen's University Press, 1975).

and land speculators bought up many such certificates or acquired them in payment of debts, and often re-sold them. By the mid 1790s the situation had got out of hand. Many of the original nominees or grantees had died, often intestate, or had left the province with the result that legal rights to property were so confused that drastic measures had to be taken to bring order out of chaos. As there was no court of equity in Upper Canada to deal with land disputes, a commission was set up with wide powers of adjudication.

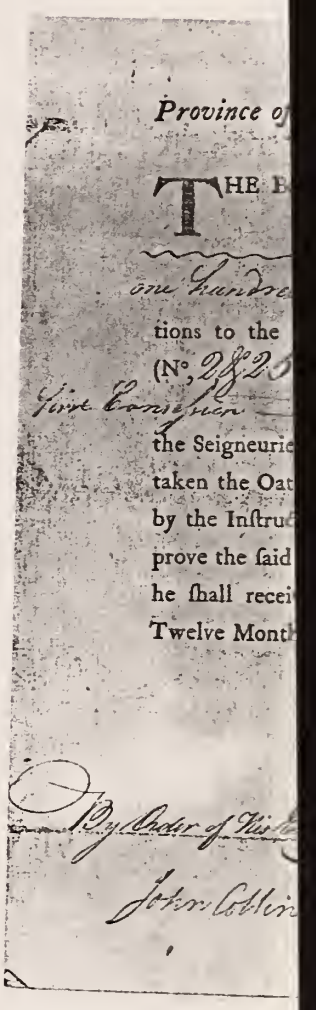
The first one, established in 1797, lasted until 1804, but was criticized because the appointed commissioners were themselves land speculators. They conveniently settled each other's claims, but not always, it was commonly felt, in the best public interest. In 1805, therefore, a new Act of Parliament set up the second Heir and Devisee Commission which was not finally dissolved until 1911, although it had ceased to function in the early 1890s. It is this second Commission that has furnished the materials for this paper,† but before we come to some of the more interesting cases that came before the Commission from this part of the province, then known as the Midland District, let me give a few facts about the Commission.

It comprised six members, three of whom had to be judges—the Chief Justice ex-officio and two justices of the Court of King's Bench. The three lay members were appointed by the Lieutenant Governor from the Executive Council. Three members, one of whom had to be a judge, formed a quorum. The Clerk to the Commission, who acted as permanent secretary, was John Beikie, an efficient and highly respected civil servant. The tribunal had power to order the production of all relevant books, papers, or documents, and could subpoena witnesses. It was stated in the Act that the Commissioners could reject or allow claims "as in their judgment the justice and equity of the case may require without regard to legal forms and solemnities." In other words, they were not bound by the strict rules of evidence observed in a court of law.

At first the Commission met twice annually, but after 1812 met only once a year during the early part of July. The number of cases heard may be judged from a typical year, 1834, when the Commission met from July 7 to 21 and dealt with 182 petitions of which 94 were allowed, 17 conditionally allowed, 51 deferred until the next session, and 10 were disallowed. The documentation which accompanied these petitions amounted to well over 1,000 pages, all of it carefully preserved. Each individual docket was separately folded and fastened together with a band of sealed paper or with red tape. On the face of each docket was inscribed the date, the name of the petitioner and a brief annotation by the Clerk or the Chairman indicating what action was taken.

The records of the first Commission are in Ottawa in the Public Archives, those of the second Commission are in the Ontario Archives where they occupy over fifty linear feet of shelf space, including, in addition to Minute Books, reports and indexes, eighty-eight filing boxes arranged in chronological order, the dockets for each year filed alphabetically by the claimants' surnames. The dockets vary in size, some containing only a few submissions, others as many as a score or even more. Three items are

† See also the author's "The Family Compact at work: the Second Heir and Devisee Commission of Upper Canada, 1805-1841", *Ontario History*, v. 66, n. 3 (Sept. 1974) pp. 129-146.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John Cobbin

Land Certificate of Capt. Mich
Cataraqui (Kingston) in 1784.

Province of Quebec, Cataraqui 28 Sept. 1784

THE Bearer hereof, Captain Michael Grass loyalist

being entitled to, One Thousand one Hundred Acres of Land, by his Majesty's Instructions to the Governor of this Province, has drawn ◆ Lot (N°, 2225,) consisting of, Four hundred Acres in the first Concession Rear in part of the said Proportion, in the Seigneurie of, N°. N° and having taken the Oaths, and made and signed the Declaration required by the Instructions, he is hereby authorised to settle and improve the said Lot without delay; and being settled thereon, he shall receive a Deed of Concession at the Expiration of Twelve Months from the date hereof.

Fred Haldimand

By Order of His Excellency

John Collins, D.S.G.

Land Certificate of Capt. Michael Grass who led the first group of U.E. Loyalists to Cataraqui (Kingston) in 1784.

always included: i) the notice of claim which had to be posted in the court house or office of the clerk of the peace for a minimum period of three months before the hearing (later reduced to thirty days); 2) a certificate signed by the Clerk of the Peace stating that the claim has been publicly exhibited for the required period; and 3) a statement from the Surveyor General's Office identifying the original nominee of the Crown for the lot in question. Supporting submissions included copies of wills, affidavits, family letters, mortgages or deeds of bargain and sale, land certificates, location tickets, army discharge papers, receipted invoices, in fact anything that had a bearing on the petitioner's claim to a particular piece of property.

When I began systematically examining the thirty-two boxes covering the period from 1805 to 1841, I soon discovered that these submissions provided a massive and hitherto largely untapped resource for the social history of Upper Canada. Almost the only use made of these files, I am told, has been by the occasional genealogist digging among the roots of his family tree. I hope to show in this paper the wide variety of information that can be found in these yellowing records, many of them never opened since John Beikie bundled them up a century and a half ago!

First let us go back to the question of literacy which sparked my original inquiry. What kind of information did the Heir and Devisee Commission in 1836 yield on this subject? On wills, affidavits, deeds, mortgages and other documents requiring signature I found a total of 412 names. Of these 363 were personally signed, only 49 marked X. On this showing a surprising 92% of those whose signatures were required were sufficiently literate to write their own names. Now admittedly the ability to write one's own name is no conclusive proof of literacy. One need only look at some of the painfully formed letters in a few of those signatures to be quite sure the penman had exhausted the limits of his competence. None the less, this is a better indicator than Mrs. Jameson's guesswork. If we say that as many as 17% of those who signed their names were, in fact, illiterate, that still leaves 75% who could read and write.

Let us look at a particular instance. In 1836, Paul C. Peterson of Fredericksburg township was astonished to discover that the land he had inherited from his father, one of the original U.E. Loyalist settlers, was about to be claimed by a man named Outwaters. Alarmed by this, he at once sought to obtain letters patent to the lot through the Heir and Devisee Commission. Popular and well known, he soon won the active support of a large group of friends and neighbours. They circulated a petition which stated in its preamble that the undersigned were prepared to testify that Paul C. Peterson had enjoyed quiet and undisturbed possession of the family farm since the death of his father, Christopher Peterson, nine years ago. They further declared that they and all other neighbours at all acquainted with the situation would feel "hurt and dissatisfied" if the property were alienated from Peterson and handed over to Outwaters. Then followed some fifty signatures, each subscriber identifying himself by indicating opposite his signature his lot and concession number in Fredericksburg or Adolphustown. There was not a single X mark among the signatures. If only one in 50 of Peterson's neighbours could read and write there should have been only one signature!

Now, of course, the Fredericksburg-Adolphustown district had long been settled—ever since the first Loyalists arrived in 1784—and a succession of country schoolmasters had all but eliminated illiteracy in the townships.

One of these schoolmasters, Alexander Simpson, turns up in a land claim of 1839. Simpson's nephew, John, fresh from Ireland, claimed, as heir at law, his uncle's Crown grant of land in Kingston township. A search of the records in the Surveyor General's Office established the fact that Alexander Simpson had been given this land, though he had never applied for a patent. In point of fact he had never occupied the lot, for by the time it was granted he had moved to Fredericksburg. There he taught a common school, as several witnesses testified, among them Hannah McDowall, wife of Rev. Robert McDowall, first Presbyterian minister in the Bay of Quinte district. She well remembered the old schoolhouse in Fredericksburg where Simpson taught, for she herself was one of his pupils. He died a bachelor in the home of Col. Timothy Thomson, she thought about the year 1798. (Other deponents placed his death as late as 1816).

What had happened to the lot in Kingston township during all this time? For thirty-six years it had been occupied and improved by one Benjamin Babcock, a squatter who found the land vacant and simply moved in. One of the schoolmaster's old friends had discovered this, and had advised the nephew, John Simpson, in Ireland, to come out and claim his inheritance.

Now apart from "legal forms and solemnities" what did the justice and equity of this case require? Certainly the land had been granted to Alexander Simpson, but he had not lived on it or made any effort to clear and improve it. Should it then go to his newly-arrived Irish nephew or to the industrious Babcock who had turned it into a prosperous farm? The Commissioners awarded it to Babcock.

And now I turn to a few claims by well-known families in the Kingston area. First the claim of John Trumpour, Jr. of Hallowell (Picton), eldest son and heir at law of John Trumpour, U.E. Loyalist of Sophiasburg, for 200 acres of land in Murray township alleged to have been granted to the senior Trumpour in response to a petition to Hon. Peter Russell in 1797. A copy of the petition, submitted to the Commissioners, reads as follows:

> To the Hon. Peter Russell, Administrator of the Government of Upper Canada &c, &c, &c in Council
>
> The petition of John Trumpeau humbly sheweth:
>
> That your Petitioner served his Majesty all the American War and came to this country at the peace with the Refugees that first settled here, that your Petitioner has a wife and seven children mostly grown up, that he has drawn but two hundred acres of land and that not fit for cultivation which obliged your Petitioner to purchase the lot whereon he now lives. It was sold to him by one Peter van Scriver, who received it from Government, for 350 acres and only contains by just measurement one hundred and twenty-five. Your Petitioner therefore prays that, taking into consideration his approved loyalty, his large family unprovided with lands, the loss he sustains in having but one hundred and twenty-five acres of land in a Lot he purchased for three hundred and fifty, the cause that obliged him to purchase, viz. not having drawn a Lot fit for cultivation, and grant him a gore or piece of land adjoining him in the Township of Sophiasburg lying between his improvements and the boundary line of the Reserve on Great Point, containing by admeasurement but seventy-five acres, which small piece of land can be of little service to any other person and will be a great acquisition to your Petitioner,
>
> Who in duty bound will ever pray &c
>
> Kingston, 10 April 1797 (Signed) John Trumpour

In addition to this humble, not to say humiliating petition on the part of his twice-duped father, John Trumpour submitted an affidavit by his father's executor, Nehemiah Osborn, swearing that the senior Trumpour's will was never registered but was "given by this deponent to one of the said John Trumpour's sons some year since, and deponent hath heard and doth believe that the same cannot now be found." He is sure, however, that the will did not mention any land in Murray Township. He also testifies to the fact that the claimant, John Trumpour of Hallowell, yeoman, is indeed the eldest son and heir at law of the said John Trumpour the Elder.

A Certificate from the Surveyor General's Office states that a search of the office records showed that on 20 June 1797, a month after receiving the petition, Council awarded John Trumpour, Sr. not only the gore for which he prayed but also two hundred acres of family land in the township of Murray (Lot 16, 9th Concession), for which, however, he did not trouble to obtain a patent, nor, it seems, did he remember that he owned this land when he came to make his will.

It is doubtful whether this claim in 1840 would have succeeded in a court of law, but the Heir and Devisee Commission took a lenient view of father Trumpour's bad luck and forgetfulness, and the carelessness of his family in losing the will, and ordered a deed to be issued for the land in Murray Township in the name of his son and heir at law.

In March 1811, two separate claims for land titles were made by members of the Herchmer family—the first to 200 acres in Kingston Township (Lot 1, 7th Concession), the second to 1000 acres in the township of Binbrook, Niagara district (Block 2, 7th Concession). The claimants were Lawrence Herchmer and his brother-in-law Thomas Markland, surviving executors of the last will and testament of Honyoust Herchmer,[3] claiming on behalf of the Herchmer heirs as named in the will, a copy of which was produced.

The will distributed the estate among Honyoust's wife Mary, the eldest surviving son, Lawrence, two other sons, Nicholas and Jacob, and three married daughters: Catherine Markland, Jane Anderson, and Mary McLean. Then follows this interesting provision:

> I likewise give and bequeath unto my said wife Mary Herchmer a negro wench named Eve and her child and the issue of the said wench and children forever; at the same time I give in trust to my said wife . . . for her life my negro [named] Mink, who is so far to have his freedom at my said wife's decease, to live with any of my children heretofore named he may please, and that with whom of them he may choose to live, thereto to maintain and cloath him decently when he is infirm and too old to work.

The will was signed on 2 February 1795. Slavery had been abolished in Upper Canada by an Act of Parliament in July 1793 which forbade bringing any more slaves into the province and gave freedom to all children of slaves when they reached the age of twenty-five.

The Herchmer claim to the land in Kingston Township was allowed, and the lot was later sold by Markland for £61, divided equally among the heirs; but the claim to 1000 acres in the Niagara District was rejected. This block of land had been awarded by the Land Board of Niagara to Honyoust Herchmer's eldest son, Lieut. George Herchmer, a U.E. Loyalist. But George was killed in a duel at Detroit, dying unmarried and intestate. Peter Smith of Kingston testified that he had served in the same corps of Butler's Rangers with Lieut. George Herchmer whose death occurred at Detroit

about the year 1780. Lawrence, as the next eldest brother, now claimed the property as heir at law. But unfortunately he was a few weeks too late in submitting his claim. Thomas Ridout, the Surveyor General, reported to the Commission on this claim as follows:

York 10th March 1812

The name of Lieutenant George Herchmer has been entered on the Plan of the Township of Binbrook for Block No. 2 in the first Concession, containing 1000 acres under the authority of the late Land Board of Niagara. The Public was notified on the 14th June last by a Notice from the Council Office, that the above-mentioned location in Binbrook, with others therein of a like nature, would be declared open for grants to other persons unless within six months from that Date [i.e. before the end of 1811] the persons whose names were therein mentioned appeared by themselves or agents to establish their claims and sue out their Patents.

Since 28th February last His Hon. the President [Sir Isaac Brock] has been pleased to allow to be located 600 acres of the above-mentioned Block. It has been stated that Lieut. George Herchmer had been killed at Detroit in a Duel during the time of the American War.

(Signed) Thomas Ridout
Sur. Gen'l.

The Markland, Macaulay and Cartwright families all had a close connection with the Heir and Devisee Commission, for members of each family, at one time or another, served as Commissioners and also submitted their own claims for titles to various parcels of land.

In 1824, Thomas Markland was involved with Ephraim Blanchard in a dispute over the ownership of 100 acres of land in Ernestown (East half of Lot 25, 4th Concession). This was a typical case of claim and counter-claim as a result of confusion over unauthorized land transfers.

The original owner, as a nominee of the Crown, was Henry Shibley who, some time before the War of 1812, moved across the border into New York State and had recently died. According to his widow, before going to the States he had transferred his Ernestown lot to his brother John, and John Shibley had sold it to William Lee who occupied the adjoining farm. William Lee, however, became so heavily in debt to Thomas Markland that his lands were seized by the Sheriff and sold at public auction, going to Markland as the highest bidder for £55.10.11½. So much, in brief, for the Markland claim.

The counter-claim of Ephraim Blanchard sought to discredit Old Mrs. Shibley's testimony denying that her husband had relinquished his ownership of the lot when he left the country retaining it, in fact, until shortly before his death. A family of squatters had occupied the lot and finally, after they succeeded in getting a deed of conveyance from Shibley, sold the property to Ephraim Blanchard.

What were the rights and wrongs of this case? Clearly the Widow Shibley's testimony was of crucial importance, but was it reliable? Two or three neighbours testified that she was old, blind, infirm, and that her mind was wandering. Markland, however, had rounded up a former neighbour, Amos Martin, who was prepared to swear that the old lady's mind was sound as a bell. But having given an affidavit to this effect, he then paid a visit to his old family homestead, saw the old lady and realized that he had been mistaken. Being an honest man, he immediately wrote to Markland withdrawing his testimony and sent a copy of the letter, attested by three witnesses, to the Heir and Devisee Commission—a letter which effectively destroyed Markland's claim. The letter follows:

Portland. July 12, 1824

Dear Sir

On my return home had an oppertunity of conversing with my old nabors and my own Relations, find I was ronge in the affidavits given you . . . Edwards and Williams and others was rite. The rong representation by me was in consequence of Conversation that I had with Old Mrs. Shibley but am satisfied that she was rong. I do not believe that William Lee ever had any possession or claim on the east half of Lot No. 25 in the fourth Concession of Earnestown. Please to pardon me for making such a gross mistake for I Did not mean any rong.

Yours regretfully

(Signed) Amos Martin

Witnessed
her
Dolly X Crown
mark
his
Elisha X Crown
mark
Alan McLain, Esqre

A claim preferred in 1830 by Alan McPherson of Napanee shows what happened to land left unoccupied by the original nominee of the Crown. In this case the land was next to the McPherson property and its neglected state was depreciating the value of adjoining lots. The McPherson petition to the Lieutenant Governor in Council, dated 22 February 1830 "humbly sheweth":

> That the East half of Lot No. 20 in the 7th Concession of Fredericksburgh in the Midland District was located in the name of John Hunter prior to the division of the Province of Quebec, but was never settled or improved by him, nor has any such a person been known or heard of in the District for many years; that a great part of the Fire wood and nearly all the Timber Trees have been cut and carried away by Lumber Men, Squatters and others, and the land will, by such depredations which are still continued, be soon greatly lessened in value unless some person can possess it by authority; that the said Land has been in possession of several Persons at different times and is now occupied by one Jacob Loucks who is not of ability to purchase; that about ten acres are improved and there are two small Houses thereon; that the Land nearly abuts six acres owned by your Petitioner on which account he is desirous to obtain it.
>
> Your Petitioner therefore humbly Prays Your Excellency . . . will be pleased to order the usual notice to be given to the Locatee or his representatives to make good any claim they may have to the said Land, and in failure of any claim being established that the same may be sold to your Petitioner, subject to such conditions as may be thought fit—or that it may be ordered for public sale as your Excellency deems most expedient . . .

The Executive Council on 9 March 1830 ordered the following notice to be published in the official *Gazette*: "Notice is hereby given by order of His Excellency the Lieutenant Governor in Council, that unless John Hunter or his Heirs do make good any claim they may have to the East half of Lot number twenty in the seventh Concession of the Township of Fredericksburg in the Midland District within six months from this date, the said lot will be otherwise disposed of." Robert Stanton, the King's Printer, certified on 16 September 1830, that the above notice had been duly published over a period of six months. As a direct result of the notice, a claim to the lot in question by one William Fairman came before the Heir and Devisee Commission but was disallowed for lack of evidence. Jacob Loucks, the squatter, had no claim to the land which he could substantiate, nor sufficient capital to bid for it at auction. Alan McPherson's petition was granted

and he was allowed to purchase the property from the Crown Lands Department for a nominal sum.

In 1837 Hon. John Macaulay was appointed Surveyor General and regularly attended meetings of the Heir and Devisee Commission. A few months after he had been in office, the Executive Council had to take him to task for exceeding his authority, even though he had been motivated by humanitarian considerations. What happened was this: a needy widow, Mrs. Elizabeth Key, desperately wanted a deed to land that had been granted to her late husband, a discharged soldier. When Macaulay found that Key himself had applied for a patent and that the reason he didn't get it before he died was a backlog of work in the office, he promptly expedited the matter and gave the woman letters patent in her deceased husband's name.

The Commissioners, however, had ruled as early as 1829 that when a grantee applied for a patent, but died before it was issued, the patent was to be deemed null and void and deposited in the Executive Council Office. (Minute Book, 3 July 1829).

In the matter of Elizabeth Key, the Executive Council decided not to rescind the deed Macaulay had granted, but adopted the following resolution: "The Council beg most respectfully to express their disapproval of the course pursued in the Surveyor General's Office, namely location in the name of a deceased person without authority." Underneath this Minute, Sir Francis Bond Head wrote in pencil: "To be communicated to the Hon. the Surveyor General." FBH

Turning to the Cartwright family, it may seem odd that Hon. Richard Cartwright, who had served on the first Heir and Devisee Commission and well knew the problems caused when grantees failed to take out patents, should himself have fallen into this error. Perhaps he had already accumulated so much patented land that he became forgetful. At any rate, when he obtained 1200 acres more as Colonel commanding the Midland District in the War of 1812, he failed to apply for a patent and neglected to devise the property in his will. His eldest son, Thomas Robison Cartwright, could have entered a claim as heir at law but did not do so and died without issue in 1826.

There remained three children of Hon. Richard Cartrwright—John Solomon, Robert David, and Mary Magdalen (Mrs. Dobbs). All three might have hoped to share equally in their late father's military grant, but, in fact, John Solomon persuaded his brother and sister to opt out in his favour, according to an affidavit signed by Robert David at Kingston, 16 July 1834.

J.S. Cartwright then wrote to John Radenhurst,[5] a senior official in the Surveyor General's Department, who was 'moonlighting' at the same time as a land agent, as follows:

Kingston, 16 July 1834

Dear Sir,

I send you a copy or rather the Probate of the will of my Father and brother from which will be seen that the property was not devised. Also the affidavit of my brother Robert which, I fancy, is quite sufficient. Mr. Hagerman could supply anything further or the Archdeacon should it be requested.

Yours truly

(Signed) John S. Cartwright

The Archdeacon was, of course, Rev. John Strachan, one of the oldest members of the Heir and Devisee Commission, and one of the most regular in his attendance. The claim was allowed without dispute, perhaps helped by the fact that the claimant was well known to every one of the Commissioners.

When Strachan became Bishop his successor as Archdeacon was Rev. George Okill Stuart, a confirmed land speculator—a taste he inherited from his father old Dr. John Stuart of St. George's in Kingston. In the late 1790s, Rev. John Stuart and his friend Christopher Robinson (father of the later Chief Justice) jointly invested in a number of lots in Pickering Township—lots which they purchased from the original nominees of the Crown or their heirs. They knew that it was important to get deeds for the lots and commissioned Lawyer Allan McLean, their fellow townsman, to act on their behalf. But unfortunately Allan McLean, if he ever got the deeds, failed to turn them over to his clients. Years later when the sons of the two speculators, Rev. George Okill Stuart and Peter Robinson, tried to get the deeds from McLean he simply couldn't find them.

Now the original nominee for one of the Robinson lots was Cornelius Burley who had moved to the United States. In 1838, his son Abner tried to claim this lot in Pickering Township as heir at law. Peter Robinson, however, got in touch with Abner's uncle, Joseph Burley of Ernestown, who signed an affidavit stating that his brother Cornelius had transferred the lot to him, when he left the country, and that he had sold it to Christopher Robinson who had paid him in full. This was enough to disallow Abner Burley's claim, but John Beverley Robinson, who was then Chairman of the Commission, drew up a long memorandum for his follow commissioners in which he went into his father's land transactions in minute detail in order to leave no doubt that his brother's claim was above board.

Mention of Rev. John Stuart brings to mind a fellow Anglican clergyman in the Bay of Quinte district, Rev. John Langhorn a man of eccentric views and behaviour whose hatred of the devil was second only to his hatred of Methodists and their saddlebag circuit riders. Perhaps he envied their larger congregations, but if so he could take consolation in the fact that the Methodist clergy were not then authorized, as he was, to perform the marriage ceremony. His own attitude to marriage, however, seems to have been highly unorthodox, judging from an affidavit of one William Harrison, a farmer from Marysburgh. He was testifying, in June 1835, that the thrice-married Mary Crane was heiress at law of her father's estate and also that of her first husband, Thomas Lloyd. Lloyd had apparently deserted her, had not been heard from, and was presumed dead. In this uncertain state of grass widowhood, Mary received a proposal of marriage from Jeremiah Storms. Although they lacked any proof of Lloyd's death, Rev. Mr. Langhorn agreed to perform a conditional marriage! In the words of the deponent: "I was also present and saw Mary Lloyd, the daughter of Elisha Crane married to Jeremiah Storms, and the Rev. Mr. Langhorn married them on condition that if Thomas Lloyd ever returned she would then become the wife of Thomas Lloyd again and leave Jeremiah Storms." Fortunately for both of them, Thomas did not reappear; Mary outlived her second husband, took Aaron Connor as her third, and went to live in the United States.

Old Testament given names such as Aaron, Elisha, Jeremiah, Odabiah, Ezekiel and so on were as common in those days as Tom, Dick, and Harry. Some other names I came across in these records were nothing if not fanci-

ful—names such as Harmonious Cryderman, Hafel Coy, Sidonia Lusty, Christian Plato, Prince Toby, the Widow Anguish (a true Dickensian touch), and my own favourite Usual Wilson. I like to think that the parents took the child to be baptized without first deciding what to call the infant, and when, during the service, the minister asked "By what name do I christen this child?", the confused parents muttered in embarrassment "Oh, the usual", whereupon the poor innocent was christened Usual Wilson.

Sometimes immigrants who left the Old Country to escape creditors changed their names so they could not be traced. The new name was not registered and this sometimes led to legal entanglements. Thus one Robert Stephens of Drummond Township in the county of Lanark obtained a land grant under his assumed name, Robert Jameson. He had been a lime merchant in Aberdeen but got into debt, and leaving his wife and family behind him, came out to Upper Canada in 1816. Unskilled as an axman, he was killed by a falling tree while trying to clear his land. Fifteen years later his son John, who had retained the true name, Stephens, entered a claim for the lot. The difference in surname between father and son was explained by an old family friend who deposed that the father's "real name was Robert Stephens and that he assumed that of Robert Jameson upon his arrival in this colony in consequence of pecuniary difficulties." The claim, however, was deferred, Mr. Justice J.B. Macaulay noting on the docket: "It must be proved that the claimant is the eldest or only son and heir at law of the Original Nominee."

Another alias was assumed by one Patrick Moylan who changed his name to Andrew Wilson, not to escape from "pecuniary" but from matrimonial difficulties, or, as he said, "to avoid being followed by a woman with whom I had cohabited before I emigrated to this country."

The spelling of names at times gave rise to difficulties. Land Board officers unfamiliar with foreign-sounding names tried to spell them phonetically, often with curious results. We have already seen that Trumpour was written down as "Trumpeau", Servos became Service, Magin, McGin or McGinnis. One Johan van Atten had a son Christopher who first spelled his surname Faunatten and later changed it to Phenneton. Such persons when claiming as heirs at law had to produce witnesses who could account for the difference in names. Old people who knew the parents, near relatives or neighbours were applied to for affidavits.

There can be no doubt that the elders of the community liked to give evidence in this and other matters in dispute, for it gave them a sense of standing and importance to sign an affidavit or to be summoned to give oral testimony before the Commission. Often garrulous, they liked to reminisce, even when, like Old Mrs. Shibley's, their memory faltered. And today, almost a century and a half later, their testimony provides flashes of insight into the life and times of the pioneers, whence they came and what they accomplished.

Here is a typical affidavit, dating from 1835, by a nonogenerian, Robert Wilkins of Ameliasburg in Prince Edward County, formerly of the 17th Light Dragoons, concerning his old comrade-at-arms, William Morris, dead these forty years and more.

> Deponent saith that he was, during the Revolutionary War, perfectly acquainted with William Morris, formerly of Philadelphia, the father of [the claimant] the said Nathaniel Morris . . . and that [they] always conducted themselves as good Loyalists. The deponent further saith that he is well acquainted with the services of the said William Morris in procuring housing

and lodging for His Majesty's troops at the first taking of Philadelphia; at the evacuation of that city by His Majesty's troops he and his son retired with them to New York . . . Nathaniel Morris worked in His Majesty's Dockyard at New York till the conclusion of the war, when he emigrated with his father to Nova Scotia with the Loyalists. From thence he went to London and came out to this country in the year ninety two in company with this deponent. This deponent further saith that the said Nathaniel Morris is the only son—if more sons he had—who accompanied him during the war and is the only one who came to this country with him. This deponent further saith that he hath not heard of the said William Morris for the last forty years [and] that he, this deponent is now ninety-two years of age. Signed in a shaky hand, Robert Wilkins, and attested in the left hand margin: "Given before me, Robert C. Wilkins [a son? or grandson?], a Commissioner for taking oaths in King's Bench."

Nathaniel Morris himself signed a lengthy deposition, identifying himself as "carpenter and joiner" of Sidney Township, son of William Morris, late of the city of Philadelphia, mariner, and Elizabeth McCarty, and was born in wedlock in the year 1760." He stated that he worked for five years in the dockyard at New York, lived in Nova Scotia for another five years before going to England, came back with other Loyalists to Quebec and thence to Kingston where he stayed (while his father went on to York) "for the purpose of drawing land," obtaining 500 acres in the rear of Kingston (Lots 23, 24, 3rd Concession). His father later went back to London and died there in 1807. In 1803 or 1804 Nathaniel visited his father to bring back a deed for the land, but on the return voyage "was cast away in Cape Cod and lost almost everything he had, including almost all the papers he had with him." He himself never obtained a patent for the land and never sold it. His last brother was killed at the battle of Monmouth. Now having arrived at the advanced age of 75 he knows no person excepting the elder Robert Wilkins with whom he had any acquaintance in former times or who could in any matter identify him.

Happily the old man's claim was allowed, and letters patent ordered to be issued to him, 13 July 1835.

In 1829 two prominent, and by that time elderly, Kingstonians, Hon. John Kirby and Allan McLean, former Speaker of the Legislative Assembly, gave evidence in support of one James Waters who claimed 200 acres in Loughborough Township (Lot 19, 3rd Concession) as heir of Humphrey Waters who was the assign of William Holford, the original nominee. But first Waters produced a deed of conveyance by which, in 1793, William Holford, in quaint wording and eccentric spelling, made over his land "to Humphrey Waters his hairs and assines for ever, and I will Defend him a Gainst my hairs and assines in peaseable procation (possession) of the sane (same)". The witnesses to this deed of bargain and sale were John Ferrier and John Grewer. Both had no doubt been customers, in the early days, at John Kirby's store, for he swore on oath that they once were "persons of credit and reputation according to their situation in life", and he recognized their handwriting; then, in order to be strictly truthful, he added that he was "not so familiarly acquainted with the handwriting of the said John Ferrier as that of the said John Grewer." Fair enough. Then Allan McLean reported what he remembered about Old Mr. Holford, that "he came to the Province in 1792 with the Loyalists that were sent out from England by the Treasury, that he drew lands in the township in the rear of the township of Kingston now called Loughborough, that the said Holford left the Province many years ago and, it was said, enlisted in the 60th Regiment, that he has a knowledge of Humphrey Waters dying at Niagara, without a will, and

believes James to be his eldest son." On the basis of this, and other evidence, the claim was allowed.

Kirby and McLean were both men of wealth and property whose families were well able to look after them in comfort in their declining years. But care of the aged in pioneer society was often a problem, especially when there was no immediate family to assume the responsibility. When an old man, living alone, could no longer care for himself, he would commonly leave his property to a kinsman or neighbour in exchange for board and lodging and a decent burial. Thus David Embury of Huntingdon Township, one of the first Methodist settlers in Upper Canada, old and full of years, spent his last days in the Fredericksburg home of Andrew Embury Sr., to whom he devised his property. In another case, David Hartshorn "becoming an infirm old man incapable of taking care of himself" was taken into the home of Andrew Hubbard, to whom he verbally assigned all his rights, title, and interest in the land he owned in Darlington Township, and, in the words of a deponent, "he, the said David Hartshorn, died in the home of the said Hubbard and was buried by him and at his expense . . . [having] supported the said Hartshorn about two years, which from his very objectionable habits no one else would do." (5 Jan. 1837). In a Court of Law, the alleged verbal assignment would not have been recognized; but the Heir and Devisee Commission allowed Hubbard's claim for looking after the old man despite his disagreeable personal habits, and seeing that he got a decent Christian burial.

Then there is another case of an old soldier taken into the home of the Fralick family in Ernestown. James Beavin had been a British regular during the Revolutionary War and after his discharge settled on 100 acres in Ernestown township, but never married and had no relatives he could turn to. Old and bed-ridden, he was befriended by Peter Fralick whose daughter Sarah, or Sally (who later married Frederick Bell) gave him nursing care. When Mrs. Bell, after Beavin's death claimed his land, three neighbours jointly testified: "We have often heard the said James Beavin declare his intention, when perfectly sensible before his death, that in consequence of the said Sally Bell's generosity and affection in nursing and keeping him clean in his indisposed situation that she should enjoy the said one hundred acres of land above mentioned as soon as she became of age or got married." Again the old man's last wishes, though expressed only verbally, were honoured by the Commissioners.

Written wills, carelessly or ambiguously drawn, sometimes gave the Commissioners more trouble than verbal dispositions. One such case, which twice had to be deferred for further evidence, prompted Chief Justice John Beverley Robinson to draw up a lengthy hand-written memorandum for the guidance of his fellow commissioners.[6] In it he clearly defines the authority of the Commission as compared with a Court of Law:

> We have no authority to vary from the testator's intention. We cannot make a will for him, nor can we rightly rescind any disposition he has made. But we may, for the purpose of giving effect to the intention of the testator . . . assume a latitude greater than Courts of Law allow themselves . . . The Board under the very extensive power given them by the Statute have in numerous instances disregarded the [legal] rules [of evidence] in order to reach what they deem to be the meaning of the testator. If I can discern clearly what this testator desired should be done with his property, I should think it right to follow that as our guide, altho' it may give the whole a different direction from that which would be given it in a Court of Justice bound by ordinary rules.

Since the members of the Commission were almost all leading members of the so-called Family Compact, one might suppose that the Commission must have been violently attacked by Mackenzie and his followers as a public grievance. Not so, however. The Commission is not even mentioned in any of the reports of grievances. Indeed its adjudications were considered to be so fair that when a proposal was made in 1837 to transfer all future land claims from the Commission to the new Court of Chancery, Parliament, including most of the reform members, voted down the proposal in order to continue the Commission, confirming the appointment of John Beikie as its permanent Clerk. His Minute Books and annual reports to the Lieutenant Governor in Council are models of their kind. He was also scrupulous in preserving all evidence, though sometimes petitioners reclaimed wills that had been submitted. In such cases, Beikie always indicated this fact with the date of withdrawal on the docket.

Most of the remaining wills, or copies of wills, are perfectly straightforward, following the legal usage of the time, but not infrequently they yield gold nuggets of information on social customs and conditions of the times.

As one might expect in the days long before 'Women's Lib', male heirs were generally favoured above female heirs. One Adam Johnston of Cornwall, for example, in his will dated 1799, made ample provision for his wife and sons, but as if it were an afterthought, left one shilling each "if demanded" to his four daughters. A Lutheran minister, Rev. John Broeffel, from the same district, was more generous thirty years later when he left £5 to two of his daughters and £8 to two others. He seems to have had an extensive library on which he placed a much higher value than, I suspect, his executors were able to realize on it. His Dutch books were to be sent to the United States, sold to the best advantage, and the money divided equally among his six sons. The will continues: "also the remainder of my books, that is either German or English books, to be sold for the support of my family . . ."One wonders how many shillings they got, but fortunately the family did not have to subsist on the revenue from some second-hand books, for the boys got, in addition, 1000 acres of land. (10 July 1829).

The only other will I came across that mentioned books was that of Rev. William Richey, a well-known Methodist minister. By a peculiar coincidence he, too, had six sons, but only one daughter, and, oddly enough, it was to her that he bequeathed his library, including six bound volumes of the *Methodist Magazine*, four volumes of John Wesley's *Sermons*, Harvey's *Meditations Among the Tombs*, and other pious and improving works. To his eldest son, Josias, he left a good feather bed, bedstead, bolster, pillow, blankets and sheets, and to the five other sons one shilling each! Evidently the boys just weren't readers!

One will that has its own poignancy was that of a poor, illiterate tinsmith, James Reilly, an ex-soldier from Ireland. Unmarried and without any relatives in Upper Canada, but during the first cholera plague, knowing he was about to die, he remembered his few friends in a simple will which he had to sign with an X.

> The last will and testament of James Reilly, tinsmith, is as follows: viz. that Patrick Hughes is to have a small pine chest and all its contents, and John Danaghy is to have the bedcloathes, overcoat and press, and George Hogs is to have the potatoes in rear of his house, and Thomas Platt to have all his tools and chattels and 100 acres of land in the township of Essa, his watch, tin and

tinware. (Signed) James his x mark Reilly and witnessed by Thomas Platt and Patrick Hughes, York, 8 Sept. 1832.

Finally, I quote one rather eccentric provision from the will of uxorious Leonard Scratch, dated 5 February 1822: ". . . in case I should die before my wife, it is my particular desire that my wife at her decease shall be buried along my left hand precisely in the same manner as we stood before the minister to be joined in matrimony."

Requiescat in pacem. In this paper I have been able to present only a few random examples of the great wealth of documentary evidence concerning the life and times of the Upper Canadian pioneers preserved in the voluminous records of the Heir and Devisee Commission.

Of the Commission itself, I have formed a high opinion. Mistakes were made, I have no doubt, and in rare cases a deserving claimant got less than his just deserts. But where there was reasonable doubt, cases were usually deferred for additional evidence—in a few instances so often deferred that time, in the end, solved the problem. Very occasionally one of the Commissioners entered a dissenting vote, but, as the Minute Books show, unanimity was the general rule. Under John Beikie, the Minutes were scrupulously kept, with greater fullness of detail in the earlier than in later years. When W.H. Lee took over from him, the Chairman of each sitting annotated the cases as they came up. These foolscap pages of notes were later bound up as the official Minutes.

John Beverley Robinson had the longest record as a member and as Chairman of the Commission, and his memoranda, written in a neat, tight, not always very legible hand, are models of judicious reasoning. And much the same may be said of notes by other chairmen—Judges Macaulay, Hagerman, Sullivan and Jones.

If, in his latter, repentant days, William Lyon Mackenzie had spent some time poring over these old records of the Heir and Devisee Commission, I hazard the guess that he might have changed his opinion of those old Family Compact antagonists. Their unremitting devotion to public duty, he could only have admired; their skill and impartiality in disentangling confused property rights without fear or favour might have been his greatest surprise.

NOTES

1 Mrs. [Anna] Jameson, *Winter Studies and Summer Rambles in Canada* (New York: Wiley & Putnam, n.d.) Vol. I, p. 191. In another place the author complains about the difficulty of obtaining reliable statistics: "the officials are all too busy and know nothing except in their own peculiar department; the difficulty of obtaining correct information of *any* kind is beyond what you can conceive." I, 181.

2 *Statutes of Upper Canada*, 45th George III (1805) First Session, Ch. II.

3 The name, so spelled and signed in the Will, was a corruption of Johann Joost.

4 PAO, Macaulay Papers, J. Joseph to John Macaulay, notifying him of his appointment as Surveyor General of Upper Canada, 21 Sept. 1837.

5 John Radenhurst was Principal Clerk in the Surveyor General's Office, and Acting Surveyor General during the illness of S.P. Hurd, whom he had hoped to succeed at the time of Macaulay's appointment.

6 This memorandum, written on three sheets of ruled foolscap, should have been bound up in the Minute Book for 1840, but, instead, was filed with the docket. (Box 30, Parcel 60).